



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Patrick Mack,
Equipment Operator (PM2593W),
Newark

Administrative Appeal

CSC Docket No. 2022-232

ISSUED: OCTOBER 12, 2021 (RE)

Patrick Mack, represented by Arnold Shep Cohen, Esq., appeals the appointing authority's failure to regularly appoint him pursuant to *N.J.A.C.* 4A:4-4.2(c)2 from the Equipment Operator (PM2593W), Newark eligible list.

By way of background, the appellant was appointed as a Truck Driver Heavy in the non-competitive division when he filed an application for the subject examination in October 2018. He was found to be ineligible initially, as his official record had not been changed from Principal Mail Clerk, and therefore, this was not a promotion. He appealed this determination and his demotion was subsequently approved, the record was corrected, and the appellant was admitted to the subject examination. This was an unassembled examination and originally there were two names on the eligible list. That list was certified on December 26, 2018, as an incomplete list, and one individual was appointed on March 26, 2019. Thereafter, the appellant's name was added on May 14, 2019, with the same score as the others, 76.543. The eligible is still incomplete, with two names, and was not certified a second time.

On appeal, the appellant claims that another individual was hired as a Truck Driver on May 20, 2019, and was provisionally appointed to Equipment Operator on July 26, 2021. The appellant states that this individual is not on the eligible list and has not been regularly appointed to the title. He argues that this appointment is inappropriate.

CONCLUSION

N.J.A.C. 4A:4-4.2 provides, in pertinent part, that:

- (c) An appointing authority shall be entitled to a complete certification for consideration in making a permanent appointment, which means:

* * *

2. From promotional and open competitive lists, the names of three interested eligibles for the first permanent appointment, and the name of one additional interested eligible for each additional permanent appointment. Eligibles who receive the same score shall have the same rank. If three or more eligibles can be certified as a result of this ranking without resorting to all three highest scores on the list, then only those eligibles will be certified.
 - i. When fewer than three interested eligibles are certified and no provisional currently serving in the title is listed on the certification, the appointing authority may either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title.

At the outset, it must be emphasized that the appellant does not possess a vested property interest in a position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990). Next, a provisional appointment is a recognized form of appointment, and the incumbent works at the discretion of the appointing authority. *See N.J.A.C.* 4A:4-1.5(a). Further, if the list is incomplete or expired, a provisional appointment is permitted as long as the individual meets the minimum qualifications for the title at the time of the appointment and the appointing authority certifies that failure to make the provisional appointment will seriously impair work.

As to a provisional appointment, the individual identified by the appellant was hired as a Truck Driver; however, he has not received a provisional appointment. If he is performing the duties of an Equipment Operator, he is working out-of-title in an "acting" capacity, which is not recognized under Civil Service rules. *N.J.S.A.* 11A:4-13 and *N.J.A.C.* 4A:4-1 *et seq.* provide for regular, conditional, provisional, interim, temporary, and emergency appointments. *See In*

the Matter of Michael Shaffery (MSB, decided September 20, 2006) and *In the Matter of Russell Davis* (MSB, decided August 10, 2005). The designation of such positions is clearly improper and in violation of *N.J.A.C.* 4A:3-3.4 and *N.J.A.C.* 4A:4-4.2(c)2i. As such, Newark is warned to discontinue the use of “acting” positions and remove Equipment Operator duties from all Truck Drivers. While it is acceptable to require an employee to perform backup duties for short periods of time, such as a day or a week, if it is known that an incumbent will be absent for a significant amount of time, such as six months, an interim appointment should be made. See *N.J.A.C.* 4A:4-1.6. Newark should consider filling long-term absences with interim appointments when those situations arise. If that is not the case, the appointing authority should consider making a provisional appointment or a regular appointment from certifying the eligible list (PM2593W), which expires December 19, 2021. In any event, the appellant is not entitled to a regular appointment, as the list is incomplete.

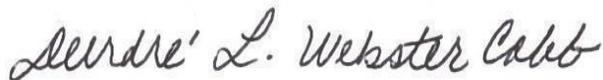
Accordingly, a thorough review of the entire record fails to establish that Patrick Mack upheld his burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF OCTOBER, 2021



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